



RABBI JONAH DOV PESNER, *Director*
ISABEL P. (LIZ) DUNST, *Chair, Commission on Social Action of Reform Judaism*

Arthur and Sara Jo Kobacker Building
2027 Massachusetts Avenue, NW, at Kivie Kaplan Way, Washington, DC 20036

(202) 387-2800

@theRAC

www.rac.org

Kenneth L. Marcus
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202
Attention: ED-2018-OCR-0064

Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,

Dear Secretary DeVos and Assistant Secretary Marcus,

On behalf of the Union for Reform Judaism, whose more than 900 congregations across North America encompass 1.5 million Reform Jews, and the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, I write to convey our profound opposition to the Department's proposal to amend rules implementing Title IX of the Education Amendment Act of 1972 (Title IX), entitled Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance (Docket No. ED-2018-OCR-0064).

We are inspired by Jewish text and tradition that mandate a moral obligation to prevent interpersonal violence. Sexual violence violates the Jewish value of *kavod ha-briyyot*, respect for human dignity. Our ancient sages taught that rape is a transgression equivalent to murder (Sanhedrin 73a).¹ These ancient lessons inspire our concerns today: By proposing rules that roll back key protections for survivors, the Department of Education is diminishing the gravity of sexual violence in schools and sending the message that student safety is not a priority.

We are also guided by the leadership of our young people, particularly through NFTY – The Reform Jewish Youth Movement, which mobilizes more than 8,000 young Reform Jewish leaders. As students facing these issues in their schools, NFTY leaders and Reform Jewish college students have made clear that the prevention of sexual violence is of deep concern and an advocacy priority.

These values inform our dedication to ensuring schools and universities adopt best practices for reporting and handling claims of sexual assault and harassment. We are similarly invested in ensuring that all aspects of such processes are fair and just for all parties involved,² including setting clear

¹ <https://www.sefaria.org/Sanhedrin.73a?lang=bi>

² <https://urj.org/what-we-believe/resolutions/resolution-student-student-sexual-violence-schools>



reporting and handling policies for institutions to follow and creating balanced due process procedures for complainants and respondents alike. We are concerned that the Department's proposed regulations will instead push schools to adopt unclear, unsafe, and unfair practices that are in direct opposition with the intended purpose of Title IX: to protect students' civil rights to access education free of sex-based discrimination, and therefore, free of fear of harassment and/or assault.

By creating barriers to reporting, limiting schools' responsibility to intervene in situations of sexual misconduct, and rolling back key protections for survivors throughout the investigative process, we believe the proposed rules ignore the devastating impact of sexual violence in schools. Research conducted by the American Association of University Women found that 56 percent of girls and 40 percent of boys in grades 7-12 are sexually harassed in any given school year.³ During college years, these percentages soar: 62 percent of college-aged women and 61 percent of college-aged men experience sexual harassment⁴ and over 1 in 5 women and 1 in 18 men are sexually assaulted at some point during their college experience.⁵ Though these figures are devastating on their own, marginalized and underrepresented students experience sexual violence at even higher rates than their peers. According to the 2017 National School Climate Survey (NSCS), more than 8 in 10 LGBTQ students experienced harassment or assault at school and more than half (57.3 percent) were sexually assaulted at school.⁶ And according to the National Women's Law Center, students with disabilities are 2.9 times more likely to experience sexual assault than their peers.⁷

Our Movement is especially concerned about the repercussions of § 106.30, which narrows the definition of sexual harassment under Title IX. Current Title IX guidance defines sexual harassment as *any* unwelcome conduct of a sexual nature.⁸ This definition, taken from the Department's 2001 guidance, appropriately charges schools with responding to harassment before it escalates to a point that students suffer severe harm. Under the Department's new proposed definition of harassment, schools will be required to ignore student-on-student harassment until it becomes "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the [school's] education program or activity" (§ 106.30). Students will be forced to suffer alone and endure repeated and escalating levels of abuse as they wait until their harassment becomes "bad enough" to report. Sexual

³ Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School*, AAUW (2011) [hereinafter *Crossing the Line*], available at <https://www.aauw.org/research/crossing-the-line>.

⁴ Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005) [hereinafter *Drawing the Line*], available at <https://history.aauw.org/aauw-research/2006-drawing-the-line> (noting differences in the types of sexual harassment and reactions to it).

⁵ E.g., David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASSOCIATION OF AMERICAN UNIVERSITIES 13-14 (Sept. 2015) [hereinafter *AAU Campus Climate Survey*], available at <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>.

⁶ Kosciw, J. G., Greytak, E. A., Zongrone, A. D., Clark, C. M., & Truong, N. L. (2018). *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*. New York, NY: GLSEN, p. 23-26 [hereinafter *2017 National School Climate Survey*].

⁷ National Women's Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

⁸https://www.nccpsafety.org/assets/files/library/Revised_Sexual_Harassment_Guidance_2001.pdf

harassment should never be allowed to continue unchecked, yet under this narrower definition, students who are harassed will be silenced and left without systems in place to address the harassment.

We vehemently oppose §§ 106.30 and 106.45(b)(3), which would require schools to ignore sexual misconduct that occurs outside of a school activity. These sections fail to address the severity and frequency with which harassment and assault involving students occur off campus or outside of a school activity. Harassment and assault that occurs off-campus is no less traumatic than on-campus harassment and assault. In fact, only 8 percent of all sexual assaults occur on a school property.⁹ With nearly 9 in 10 university students living off-campus¹⁰ and 41 percent of college sexual assaults involving off-campus parties¹¹, this rule would require schools to turn a blind eye to the majority of assault and harassment students experience. It is imperative that schools not only be *allowed* to investigate instances that occur off-campus, but it should be a requirement for educational institutions to investigate *all* incidences of harassment and assault that impact their students—regardless of where the specific incident occurs.

Though we firmly believe in the importance of due process, we disagree with the Department’s use of the purported need to increase protections of respondents’ “due process rights” to justify weakening Title IX protections for survivors. The current Title IX regulations already provide rigorous due process protections for respondents. The addition of § 106.45(b)(3)(vii), which requires colleges and graduate schools to conduct a “live hearing,” and requires parties and witnesses to submit to cross-examination by the other party’s “advisor of choice” is humiliating and traumatic.¹² Too often, survivors are asked detailed, personal, and humiliating questions, often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced.¹³ This kind of cross examination would discourage many students from participating in a Title IX grievance process and will dissuade those who have experienced or witnessed harassment from coming forward. We strongly urge the Department to enforce the process that K-12 schools adhere to: a fair, trauma-informed process that allows students to submit written questions for the other side to answer. The use of written questions strikes a balance between the need to examine the strength of the evidence without the risk of retraumatizing a survivor.

As a religious organization, we are deeply concerned about § 106.12(b), which details changes to the process through which colleges and universities claim religious exemptions from Title IX. Currently, religious institutions may claim an exemption by providing written notice to the Department of Education detailing which provisions of Title IX conflict with tenets of the school’s faith. The proposed rule eliminates this requirement, however, and allows schools to invoke an exemption after

⁹ RAINN, *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem>.

¹⁰ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, NEW YORK TIMES (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87%).

¹¹ United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, https://www.ue.org/sexual_assault_claims_study.

¹² Association of Title IX Administrators, *ATIXA Position Statement on Cross-Examining: The Urge to Transform College Conduct Proceedings into Courtrooms 1* (Oct. 5, 2018), available at https://atixa.org/wordpress/wp-content/uploads/2018/10/ATIXA-Position-Statement_Cross-Examination-final.pdf.

¹³ Zydervelt, S., Zajac, R., Kaladelfos, A. and Westera, N., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?*, BRITISH JOURNAL OF CRIMINOLOGY, 57(3), 551-569 (2016).

discrimination has occurred. Institutions would not be required to provide advance notice to prospective or current students about the school's intent to claim a religious exemption. These changes would eliminate critical transparency and could lead to situations in which students may unknowingly enroll in an institution where they could face legal discrimination. We fear the proposed rule would especially place LGBTQ students at risk. Over 75 institutions have already claimed exemptions from Title IX's guidance on sexual orientation and/or gender identity, and more schools could continue to do so if the process of claiming an exemption is relaxed.¹⁴

The Mishnah, a collection of Jewish teachings that supplement and complement the commandments in the Torah, teaches, "One who injures another person is liable on five counts: for the injury itself, for pain, for healing, for loss of time, and for embarrassment" (Bava Kamma 8:1). This sacred teaching alludes to the way that sexual violence and harassment have repercussions far greater than the act itself. It is with this text in mind that we urge the Department of Education to withdraw these proposals and instead return to enforcing the Title IX requirements that the Department has relied on for years. It is only through the enforcement of these standards that schools will be held accountable for promptly and effectively responding to sexual harassment, and that all students will be able to access their education without fear of sex-based discrimination.

Sincerely,
Barbara Weinstein
Director, Commission on Social Action of Reform Judaism

¹⁴ Movement Advancement Project. October 2018. *Title IX, Religious Exemptions and Campus Climate: LGBT Protections in Higher Education*. www.lgbtmap.org/Title-IX-Religious-Exemptions-Higher-Education